

THE TRIAGE TRILEMMA

*Steven Lubet**

Everybody is going to start this way, but I have the benefit of being the second speaker so it hasn't gotten old yet. It is a tremendous honor to be speaking at a conference based on the works of Monroe Freedman, who is one of the few people, maybe the only person, who has actually managed to change the entire discourse in a field of legal studies.

Among his many great contributions, of course, is the concept of the trilemma. And the reason I find the trilemma so endlessly engaging is not because he coined a cool word, but because the trilemma has obliterated the ability to provide easy answers to a tough question.

If you come back with me thirty years ago, and think about Professor Freedman's insight, it wasn't so much that he identified three distinct values: The lawyer has to know everything, the lawyer has to keep everything secret, and yet the lawyer has to be candid. That's the trilemma. More importantly, Professor Freedman said: The easy answer—which is, "I'm not going to find out whether my client is lying; I will just avoid learning that,"—becomes unavailable. The simple reductionist solution to the problem can no longer be used.¹ And that actually leaves us with a simpler dilemma.

Once you have a dilemma, comprising two equally unpleasant solutions, then it can be resolved by prioritizing. Professor Freedman, as we all know, gives the highest priority to maintaining client confidentiality.

Now I would like to suggest another trilemma in a way that also avoids—or I hope will cause us to avoid—easy answers. Oddly enough, I came across this problem while I was doing the research for my next book, which is called, *Lawyers' Poker: 52 Lessons That Lawyers Can*

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1. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 35-38 (1975).

*Learn From Card Players.*² It really is a book about poker and the lessons that we can draw for litigation and other aspects of law practice from the genius of the great poker theorists. And yes, there are great poker theorists. The best poker players are absolutely brilliant, and they know more about playing cards than just about any lawyer knows about practicing law. I strongly commend their work to you.

To put it simply, the key concept in all of poker, the main thing that you absolutely have to know if you are going to win money, is the theory of expected value. In poker, you are always betting on the basis of expected value. What does that mean? Well, it means that every bet has to have what game theorists would call a positive expectation.

So that seems easy enough; you don't bet unless you think you're going to win. But that's not quite right. A positive expectation doesn't mean that you are going to win. It means that if you make this same bet enough times, you will eventually win more than you lose. Let me make that explicit. Imagine that you are holding four cards to a flush. You need five cards of the same suit in order to complete your flush, a four flush is worthless. But if you get the fifth card, that's a monster hand. That's a big hand. You are probably going to win.

Now, if you are playing Texas Hold 'Em and you draw the first four cards to the flush, there are three more cards to come. What is your likelihood of filling it? It's just under 20 percent, maybe 18 or 19 percent that you are going to win. That may not seem like very good odds, one out of five. Four times you are going to lose and only the fifth time are you going to win. So you might think that isn't a good hand, but it can actually have a positive expectation *if* the payoff is big enough. If the amount of money in the pot is six times greater than the bet, then the bet has a positive expectation even though you will lose four out of five times.³ This is a very hard lesson for amateurs to learn, but it's absolutely true if you play enough poker. You can lose four out of five times and still win if you are always betting on positive expectations.

This creates a real question for lawyers. How can lawyers take advantage of the theory of positive expectation? Personal injury lawyers, of course, have raised this to an art form in case selection, which obviously makes a lot of sense—you don't have to win all your cases in order to make a profit. Within the confines of a particular case, you can

2. STEVEN LUBET, *LAWYERS' POKER: 52 LESSONS THAT LAWYERS CAN LEARN FROM CARD PLAYERS* (forthcoming May 2006).

3. Assume that your bet is \$10 and that there is already \$60 in the pot. If you lose such a hand four times, your total cost will be \$40. On the fifth hand, however, you will win \$60, for a total payoff of \$20. Thus, the bet has a positive expectation.

also see the virtue of betting on positive expected value. You might ask thirty searching questions in a deposition, hoping that at least one will strike pay dirt.

But what about tactics that are spread out across many cases? That is the hard question. Can you engage in a tactic that is going to lose four out of five times? That is, four out of five clients will suffer for it—but the fifth is going to win big. For four out of five clients this is going to backfire, but the fifth one will get the payoff.

Now, you might think that's a fanciful hypothetical. Could there really be such a tactic? But if you think about it, if you sort of re-imagine the cases, it actually turns out to be a very realistic situation. I will just give you one simple example. It's the decision about whether to take a bench trial rather than a jury trial. Say you are a public defender, or a long-term criminal defense lawyer, and you are looking at your hopeless cases. Do you take a bench or a jury? Well, you usually take a jury trial if it's a hopeless case.

Why do you take a jury trial in a hopeless case? Because lightning might strike. Once in a while, you are going to get an acquittal. Eight or nine times out of ten, or even more often, not only are you going to lose the jury trial, but the defendant might actually be worse off because of the so-called jury tax. In most big cities, with crowded criminal dockets, a defendant is sentenced more heavily if you take a jury trial instead of a bench. You can think of the lighter sentence as an implicit incentive for taking up less of the court's time; or you can think of the stiffer sentence as an implicit penalty for insisting on a jury trial. In any event, criminal defense lawyers regularly opt for jury trials in hopeless cases, because lightning might strike. This is a theory of expected value, risking certain losses in the hope of one substantial benefit.

And actually, it's deeper than that. If you are a regular in the criminal courts, you quickly realize that you will get better plea bargain offers if now and then you insist on a jury. You can realistically influence the prosecutors by saying, "Well, if you don't give my client a better offer, then you are going to be sitting through a two week jury trial." Thus, when you fulfill your threat to take the jury trial, that improves your offers down the road for other clients, even though the convicted defendant in the jury case takes a bigger hit at sentencing. So if we are honest about it, I think we can imagine circumstances where lawyers regularly adhere to the theory of expected value.

Of course, this poses a trilemma, for which there is no easy answer. What is the trilemma? Well, first you have an obligation to the "instant client," the client standing next to you in court. Then you have

obligations to your “absent clients.” These are not merely hypothetical or future clients. These are people whom you currently represent, but they don’t happen to be with you at the moment. Their cases will come to court next week, next month, or next year, but they’re still current clients who are depending on you for representation. And finally, as always, you also have obligations to third-parties and the justice system, and a duty of candor to the court. So there you have a trilemma, and I’m afraid I am only going to continue to describe it, because I haven’t yet figured out the resolution.

Lord Brougham, it seems, did have an answer. He said rather famously that an “advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client.”⁴ Whatever your view of zealous advocacy, however, the statement is obviously untrue in the broad sense, because most lawyers have multiple clients. You cannot be wholly dedicated to one person in all the world because a busy, active litigator will have twenty, thirty, fifty, or a hundred concurrent clients. A successful personal injury litigator may have 1000 clients or more. And you have simultaneous obligations to all of them. So you cannot simply say, “I know but *one* person in all the world.”

Moreover, the dynamic of litigation, I suggest, creates a balance of disadvantages among multiple clients even when you are scrupulous about formal conflict avoidance. Whenever you have a moderate to large caseload, it is impossible to serve every client equally all of the time. This is what I mean by “balance of disadvantages,” and I believe it is unavoidable.

Let me provide an example from the field of indigent criminal representation, although I believe it extends into other forms of litigation as well. Imagine that you are in a pre-trial conference attempting to work out a plea bargain. Either the judge or the prosecutor turns to you and says, “Well, Counsel, did your client do it?” There are three possible answers to this question. They are: Yes, no, or none of your business. The fourth possible answer—“I don’t know”—was obliterated thirty years ago by Professor Freedman. You have an obligation to learn everything, so it is no longer acceptable to say “I don’t know.” This leaves you, then, with yes, no, or none of your business.

Well, it is out of question to say “yes.” “No” is also a problem because you might be lying. I don’t think this is one of the circumstances where anyone would suggest it’s permissible to lie, so you can’t lie. But if you truthfully say, “no, my client didn’t do it,” then you are damaging

4. FREEDMAN, *supra* note 1, at 9 (quoting 2 Trial of Queen Caroline 8 (1821)).

all of your other clients who did do it, because you are going to be sitting in that same chambers the next day or the next week with one of them. And in the later case, when the judge says, "Did your client do it," and you mumble "hmm, uh, hmm, I can't answer," you will have implicitly violated confidentiality with regard to that client.

So that leaves the third option, which is *always* to say, "Your Honor, I can't answer that question." But there is the problem again. You are asked, "Counsel, did your client do it?" And you respond, "You know I can't answer that question." That protects the confidences of the guilty clients, but it sacrifices an advantage of the innocent clients. If, as a defense lawyer, I am constrained from ever making a point of the innocence of my client—in order to avoid differentiating between the culpable and the nonculpable—it is the nonculpable who suffer.

Now, you could say to me that no responsible judge or prosecutor would ever ask that question. And I say to you, I must have appeared before some very irresponsible judges and prosecutors in my time. But please understand that I am using this situation only as an exemplar; comparable problems arise in many different ways in both criminal and civil litigation. So even if you have never confronted the "did he do it?" question, and even if you assume that you never will have to confront the question, you still have the problem of whether a lawyer can declare one client's innocence as a plea bargaining tactic: "Your Honor, this time I have someone who really didn't do it." That can surely help the instant client, but it potentially hurts many of the others. Thereafter, every time you don't proclaim innocence, you are disadvantaging your "guilty" clients. On the other hand, if you refrain from ever saying it, you are disadvantaging the "innocent."

And that raises the issue of triage. That is, can one be a vigorous advocate and yet engage in triage, which means dividing your clients into categories based on which ones can be helped the most? Are the clearly innocent entitled to the greater benefit of their nonculpable status, even though that surely disadvantages the clients who are probably guilty? Or must we be silent about innocence in order to protect the guilty? The classic answer to the problem is to say almost reflexively, "I can't do anything that will hurt my instant client. I must pay all my attention to the person who is standing next to me in court right now, whether guilty or innocent. I cannot consider 'absent clients' because the immediate client is entitled to all of my advocacy."

But that just has to be wrong. I will just give you an example from the rules where we clearly care about absent clients. Rule 5.6 of the

Model Rules of Professional Conduct⁵ says that you can't enter into a settlement that would restrict your right to practice law. Why not? Such settlements always benefit the instant client who wants to accept the proposed settlement. Nonetheless, the deal is prohibited because it would prevent others from retaining their counsel of choice. So Rule 5.6 is intended to protect future clients—not just absent clients, but hypothetical clients who may or may not even exist. It says that you can't enter into a settlement today that may be extremely helpful to a current client, because it might prevent you from taking another case somewhere down the road.

Thus, it is really impossible to say that a lawyer owes her absolute duty only to instant clients. Thus, triage is inevitable. And yet, we have rules—principally regarding the rigorous protection of confidentiality—that effectively say that we cannot do it. Hence the trilemma. And alas, unlike Professor Freedman, I don't have the answer.

I do have another question, however, and perhaps we will learn the answer at the banquet tonight. What would you say if a judge addressed you and said, "Counsel, are you one of those lawyers who have listened to Professor Freedman's banquet speech, and who believes in 'Lying to Judges, Deceiving Third-Parties and Other Ethical Conduct?'"

Thank you very much.

QUESTION & ANSWER

PROFESSOR SIMON: Thank you very much, Steve. Now you know why we wouldn't take no for an answer. I think the timing on this was actually not very convenient for Steve to fly up here, but we told him we needed him here. So we now invite questions.

PROFESSOR LUBET: He warned me about this.

PROFESSOR FREEDMAN: Monroe Freedman. I just want to thank Steve because I am going to talk about that subject tonight and I'm going to explain why the answer is, "no, your Honor, he did not do it," even when you know that he did. And so thank you for the setup.

MR. TEMPLE: Ralph Temple, practitioner in Washington, D.C. for about forty years now, semi-retired in Oregon. I think the problem as you pose it overlooks that the system has to protect the right to counsel. And the system's rules should not put counsel in a position whereby vigorously advocating the cause of one client, she is subverting the causes of all her other clients. That's why the judge should not be asking

5. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2005).

that question and why I think Monroe's answer is the right answer; that when the judge asks a question the asking of which subverts the system, the lawyer should protect the system by giving the only answer that is appropriate, which is "no."

PROFESSOR LUBET: Let me rephrase the question then. I accept that. I mean, I accept that the judge shouldn't ask the question. I'm anxious to learn why in that circumstance the lawyer must say "no." But even that, I think, doesn't solve the problem of triage and instant versus absent client. I will just recharacterize the question. In the film *Reversal of Fortune*⁶—I think somebody here had something to do with that—I remember very clearly that the defense lawyer, Alan Dershowitz, rejected using "the guilty man's argument." He said, "I don't want to make the guilty man's argument." And I think I remember correctly that the opening line in his appellate argument was, "Your Honor I stand before you representing an innocent man." Well, that's fine if you are an occasional litigant in the Supreme Court of Rhode Island. Having never been there before, not likely to come back there again, you can say it without cost: "I stand before you representing an innocent man." But if you are a public defender, day in day out at 26th and California, or if you are not a public defender but a regular at 26th and California,⁷ I guarantee you that if one day you went into chambers and you said, "Your Honor, I am here before you representing an innocent man," the next day the question would be, "Nu, well, what are you saying today, counselor? Is this guy innocent, too?" And then we would have the identical problem of triage.

MR. TEMPLE: Well, I believe that you are not supposed to express to the fact finder a personal opinion about the case. What you do is you argue the case. You argue the rules of law. You argue the facts. I don't think you stand in front of jury and say—

PROFESSOR LUBET: I wasn't in front of a jury. I'm in chambers, plea bargaining.

MR. TEMPLE: I think you've got the same kind of ethical problem when you started expressing an opinion to the judge and it is an ethical problem for the very reason that you point out.

PROFESSOR LUBET: You know, that's a great point. But I have to wonder if those are the ethics. Because how can we have a system of ethics in which I cannot profess a client's innocence in the course of bargaining with the judge and the prosecutor? Are we really to the point

6. *Reversal of Fortune* (Warner Bros. 1990).

7. The Criminal Courts building in Chicago.

where I've got to say that factual innocence is ethically inappropriate for me to assert in the pretrial negotiation? Maybe it is, you know. Perhaps you're right. But that's why it's a trilemma.

MS. LONDON: Joyce London. I have a bit of a problem with your question in the first place, because we are assuming here that the presumption of innocence is no longer present in the courtroom. So really, the obvious response to any judge who says that is, since we have a presumption of innocence it's up to the prosecution to meet their burden. You either believe that they can meet their burden or you may have facts that they can't.

PROFESSOR LUBET: Well, I think you are completely right, of course, but I think that answer still disadvantages the factually innocent client by failing to differentiate between the innocent and the factually guilty.

MS. LONDON: Why would you plead for a factually innocent client? They are the ones who should go to trial.

PROFESSOR LUBET: What can I say? Sometimes the risk of trial is too great. Sometimes you are trying to get the prosecution to dismiss the most serious charges, by pleading to something inconsequential.

PROFESSOR DERSHOWITZ: I want to work out with you the implications of what I think is a very interesting position. First of all, your position is not a hypothetical. Earl Warren when he was the district attorney of Alameda County would call in all the public defenders and say, "Look, I don't want to put an innocent person in jail. And if you really believe honestly in the heart of your heart that you are actually representing an innocent person, I want you to come to see me and I will show you the entire file, you will take it home with you for a week. And if you come back and look me straight in the eye and after looking at the whole file tell me on your personal word that your client didn't do it, I will drop the case." Imagine the position that puts public defenders in. But I want you to imagine for a minute the position it puts any lawyer in if you are able to assert your client's innocence. Every client will insist that I take that tack. Then you have to negotiate with your client: "Sorry, for you I can't assert it although I asserted it for the other guy." And then he says, "Oh, did I make a terrible mistake. If I knew that was your position, I would have spent all my time being an advocate to you and trying to show you why I'm innocent, why I get the benefit of the innocence argument." It totally changes the nature of the legal representation. But you are not the only one who takes that view. Professor Keaton in his book takes the position, and he criticized me personally in this way, one of the first cases I ever had—

PROFESSOR LUBET: Criticized *you*?

PROFESSOR DERSHOWITZ: Absolutely. And he joined a large group of people in doing so. First case I ever had, I represented kids from the Jewish Defense League and I pulled a very slick trick; that is, I cross-examined a lying policeman who we had tape recordings of having made certain statements, but he never made the key statement on tape. And so I led him to believe that I had a tape of the key conversation, read to him from a transcript which appeared to be a tape, and he admitted that he had made the statement and we won the case. And this has become, obviously, a staple of “did I go over the line or not.” It was Keaton’s position that I did not go over the line, but that I shouldn’t have gone up to the line. Why? He said I helped my own client facing initially the death penalty and then life in prison, I helped my own client, but I hurt all my future clients because every judge would then suspect and then know, as Judge Baumann put it to me, “The reason you tricked me,” he says, “is because I treated you like a law professor. You are really like any other sleazy lawyer downtown.” And I said, “Thank you for the compliment. You mean I don’t provide less zealous representation than the law professors do.” But he was absolutely right. I couldn’t do that again. I hurt my credibility as a lawyer. And I made a very conscious choice to do that because I took the position that only the client in front of me mattered. Now, tell me why I’m wrong.

PROFESSOR LUBET: I’m not going to tell you that you are wrong. I’m going to tell you that you raised a problem.

PROFESSOR DERSHOWITZ: We both raise problems. Why are your problems—

PROFESSOR LUBET: I think I would say that you probably didn’t have any other clients at the time because you were a law professor. So for starters you don’t raise the issue that I do about disadvantaging a simultaneous or concurrent client who just doesn’t happen to be in the room, which is the issue I’m more concerned about. So to say—to prefer an actual client over a hypothetical client, which is what you did in that case, is certainly a far less acute dilemma than to prefer one actual client over another.

PROFESSOR DERSHOWITZ: By the way, I solve that because you can then alert your future clients to the fact that you’re damaged.

PROFESSOR LUBET: You can say there was a trick I once played, and I can’t play that anymore. Perhaps you can try to find someone who still does have that arrow in his quiver.

PROFESSOR DERSHOWITZ: By the way, just to correct the record, you are absolutely right; the film *Reversal of Fortune* had me

saying, “I represent an innocent man”—what I remember I actually said was, “I am representing a man who the evidence shows has been wrongly convicted.” So you play the game and you use the words that are appropriate—and then in the movies they always change it.

PROFESSOR LUBET: Here is the person responsible for luring away from my law school the champion of the wrongly convicted. We don’t forgive you, Professor Rhode, for this, taking Larry Marshall from Northwestern to Stanford.

PROFESSOR RHODE: I stand convicted, and we’re proud to have him and hope he does for our school what he did for yours in terms of clinics. I don’t know whether I’m missing something here or this just affirms your point that triage is inevitable. But it seems to me once you let in the concerns about the lawyer’s reputation, triage happens in all cases. Lawyers are always making judgments, both tactical and substantive ones about how is this going to affect my standing with repeat players, with judges, with future people in the community. We know that oftentimes lawyers make those decisions in civil cases as well as criminal cases. Negotiating hard in one instance may poison your relationships, if it’s a small bar and a small practicing community, in the future. I think that’s something that is always in the back of a practitioner’s mind making it explicit that current clients sometimes pay the cost when lawyers’ reputations are also in play, it’s a good thing. But I also think it’s a good thing that lawyers care about their reputation in the broader community. And if the judge, Alan, in your case thought you did something sleazy, maybe that’s a signal. You may want to stand by what you did in that particular case. But it doesn’t particularly trouble me in some instances when reputational concerns kick in. I think it’s highly contextual. And I think we are deluding ourselves if we don’t think that it matters in all spheres of legal practice not just in the paradigm case you identified.

PROFESSOR LUBET: Yes, sure, I agree. Although our written rules don’t take that into account. You know, the paradigm that we express is different from the reality.

PROFESSOR RHODE: Except they say, if lawyers decide not to take the case—

PROFESSOR LUBET: What the rules don’t say is that you are allowed to put your reputation ahead of the client’s interest, although of course lawyers do.

MR. BLACK: My name is Barry Black and I’m a Hofstra Law School graduate. Thanks for coming and speaking with us. I would just like to add one thing to the mix, which is I have been practicing criminal

defense now for the last five years approximately and the one thing I would like to add is that sometimes there are instances where one cannot separate one client from another. I've had conferences with assigned assistant district attorneys who have been the attorney on two or three cases where I represented defendants. Now, I'm sitting here with three files in front of me. I will give this guy five years, don't ask for any more on Smith, but I'll do better on Jones. Now, I don't know how you can separate one from another in that instance.

PROFESSOR LUBET: There is a rule that says that you can't engage in that sort of collective bargaining and yet the prosecutor gives you no choice.⁸

MR. BLACK: Sometimes there are multiple defendant situations or co-conspirators or such.

PROFESSOR LUBET: Maybe Carol has the answer.

PROFESSOR NEEDHAM: Not to that one. Carol Needham from Saint Louis University. I'm actually here to ask you sort of a challenge question. And that is, have you thought about the way that your trilemma would be resolved for a lawyer representing a corporation, and would that be resolved differently? The lawyer who knows about the Ford Explorer, something bad in the corporation, on some level, the need to keep it quiet versus not keep it quiet to advantage the client. If you would resolve the trilemma differently for the Dalkon Shield in-house lawyer or so on than you would for the criminal defense lawyer, why do you justify resolving it differently in one context compared to the other?

PROFESSOR LUBET: Again, I think I tried very hard not to resolve—not to suggest the resolution, but rather simply to raise the problem and ask for recognition of it. So I am thinking that if I knew the answer, it would be the same in both cases. I do think, though, it comes up in civil litigation. Everybody uses the criminal cases because they are sharper and easier to understand. But I will give you an example actually from civil litigation. The general rule is that you can't simultaneously take adverse legal positions in the same court. You can take inconsistent legal positions in different courts. You can do that, but if you have two cases in the same court you are not permitted to take inconsistent legal positions. And then, if you read your Restatement it says you should decline the second representation. But, that is just a fantasy, because you don't know that inconsistent legal positions will be necessary until two or three years into the two cases. So now, here you are, you're discovering two or three years down the road that you've got two cases

8. See MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2005).

in the same court and different lawyers in your firm have been taking inconsistent legal positions. And so the Restatement tells you to withdraw from one of them. Well, which one? That's a huge cost. If it's big litigation, if you are representing corporations, this is not costless to the client to be withdrawing. So my question is, can you triage? Do you have to say: "I can only stay with the oldest client even if the cost is greater to the newest one?" That seems wrong. Can you ask, "well, to which client is this issue more central?" Or can you decide which client can least afford the cost of retaining new counsel? Can you bring into it which client has the better case generally? Which client is more likely to win on the merits? Which client is run by a bunch of jerks? You know, these are all considerations that would seem to be salient in any other profession and yet our embedded preference, our embedded temporal preference for the first or the instant client, I think, seems to lead to bad or wrong answers.

MS. RINGLER: Hi, Robin Ringler. I've always found it kind of despicable in civil court when I am dealing with an attorney who does seem to be trading one client's advantage for another—in exchange for another client's, someone who goes into the same court all the time, same judge and seems to be making a deal on one case and then sort of letting another case go. And that to me is much more purposeful than what you seem to be talking about—the judge actually asks you if your client is guilty or not. And my view is from civil court. Do you see a difference? Because it does seem like the end result is almost the same, really. You are being forced to trade, to triage.

PROFESSOR LUBET: The end result is the same.

MS. RINGLER: Do you find the purposeful actions more despicable somehow or is it really just the same?

PROFESSOR LUBET: Is it always wrong? That's my question. At the level of the highest abstraction, if the advocate knows one person in all the world, then trading the advantage of one client for the advantage of another is indeed despicable. At the poker table level, right, in game theory in the trenches—rejected subtitle for my book by the way—at the level of game theory in the trenches, if you come to the conclusion that sometimes trading one client for another is unavoidable, then is it despicable to articulate some standards and say: "Some clients are going to benefit, some clients aren't and I'm inevitably going to have to choose?" And if I'm going to choose, I ought to do it at least on the basis of some objective standard of merit. Do some clients deserve better treatment than others? Physicians have no trouble saying this. Physicians have absolutely no trouble saying: "I'm going to let the guy with the

broken leg sit there and scream in pain even though he came here first.” Go to an emergency room, you got here first and you are screaming in pain, but here is someone whose life is in danger and she is going to get treated first. I mean, they don’t even apologize. If they talk to you, they don’t even apologize.

MR. STERN: My name is Allan Stern. I don’t do criminal work, but I do civil and I have been doing it for about twenty years. What I’m interested in understanding is when the judge asked the attorney, “did your client do this,” can you fall back—and maybe this is simplistic analysis—but can you fall back on the issue that this is an ultimate decision to be made by a jury? To ask me if my client is guilty, to ask me if my corporation’s negligent, is an ultimate conclusion of fact. Since everyone is innocent until proven guilty or nonculpable until established to be such, would it be inaccurate to simply state that he is not guilty?

PROFESSOR LUBET: I think that’s what most lawyers do. I think that the overwhelming response is some version of, “I can’t answer that, or everyone is innocent until proven guilty, or can’t we all just get along.” But my point is that this hurts the truly not guilty. The paradigm—and Alan Dershowitz actually articulated this in the early answer to a question—is that we treat all clients alike. The guilty and the innocent are all in the same boat. We treat absolutely everybody the same. And my question is, doesn’t this hurt the innocent? And if it does, as I think it does, at least sometimes, should we at least think about whether that’s right? And if we think it’s wrong, what should we do? One, two, three. Trilemma.

PROFESSOR POWELL: Burnele Powell, University of South Carolina. My question has to do with the mechanics of working out the process of deciding what to do.

PROFESSOR LUBET: Your questions all have to do with that.

PROFESSOR POWELL: Thank you, I will take that as a compliment.

PROFESSOR LUBET: It is a compliment.

PROFESSOR POWELL: When you indicate that you want to turn to the issue of weighing and engaging in triage on behalf of this situation, are you suggesting that your first activity would be to turn to the clients and discuss this with them? Or are you suggesting that this is the determination that you need to make independent of the client? The reason I ask that is that in representations, at least I have always assumed, that it’s the client’s case. You know, it may be your trial, but it’s the client’s case.

PROFESSOR LUBET: This is the problem that Alan raised before which is that if you tell your client, "I will advocate differently for you if you are innocent," then you can forget about learning the truth in somewhere approaching ninety percent of all cases. So again, trilemma. It's an impediment to knowledge. So clearly you could not do that, right? Clearly, as a pragmatic matter, you could not announce that to the client at the beginning of the representation. And I am left more at sea than when I started except to say that there should be some way that the advantage of factual innocence is not lost. And we hate to say: "Well, we just have to sacrifice the advantage of factual innocence in order to give better defense in the case of factual guilt."

PROFESSOR SIMON: We will have to make this the next to the last question.

PROFESSOR WOLFRAM: Charles Wolfram. My question is about the scope of the paper, and I understand in twenty minutes you can't give all the paper. Most of the illustrations that you have described in your talk involve conflicts between clients present, future, et cetera or in a sense between the lawyer's reputation, but that also has an impact on present and future clients. But none of them involved a conflict between the client's interest and the lawyer's personal interest. For example, in giving that long list of considerations that the lawyer could take into account in determining which of two clients to withdraw from, you never mentioned the one that I think would come first to a lawyer's mind, which is the client who is going to pay the bigger fee if I continue to represent them.

PROFESSOR LUBET: Right.

PROFESSOR WOLFRAM: And let me just throw this in and then I will sit down. Another consideration which I think is absolutely present in every case and that is the lawyer's decision about how much time to spend on a matter. Or, somewhat differently, which phone calls to return first. In all of those cases, I think it's lawyer's self-interest often that determines what is to be done. And I simply pose that not necessarily to answer it but to get your reaction to it.

PROFESSOR LUBET: I did try to address this, as you observed, without discussing the lawyer's self-interest. And that is to say, if we are simply concerned with client interests, we still have the problem of triage. That was my postulate. Once lawyers' self-interest comes in, of course everything else goes out the window because many lawyers, probably most, will pursue at least at some point their self-interest without telling anybody, either by rationalizing or not caring completely about client interest. And actually, I think a strong argument for the

instant client model, or for the temporal model, is that it eliminates the possibility of the client interest factor being the trump. So, for example, you say, well, I've got clients with inconsistent legal positions, I have got to choose between one of them. I must choose the first in time. If that's the answer—even though I think it's the wrong answer in terms of client interest—it is a mechanical way of saying, “and therefore I cannot consider at all my self-interest,” which is, of course, what many lawyers would prefer to do.

PROFESSOR SIMON: Steve, my question is—

PROFESSOR LUBET: I was wondering why you said second to last when there was nobody else in line.

PROFESSOR SIMON: Good poker players, I believe, can bluff repeatedly; not on every hand, but they bluff many times. Why can't good lawyers learn to bluff repeatedly so that they don't have to really face the trilemma?

PROFESSOR LUBET: I couldn't have paid you to have asked a better question than that (and I'm hoping I haven't paid you). So good poker players can bluff repeatedly. Why can't good lawyers do the same thing? But here's the problem. You know why good poker players can bluff repeatedly? Because sometimes you get caught. And sometimes you are not bluffing. Sometimes the bluff is called and it's not a bluff at all. The whole point of bluffing is that sometimes you don't get away with it. And that sets up the other hands where you actually have winning cards. So the whole model in which sometimes you lose in order to win later is exactly what allows you to bluff repeatedly. And it's exactly the model that lawyers are not supposed to follow and that's creating, again, the trilemma.

So thanks very much. [Applause]

PROFESSOR SIMON: Thank you very much, Steve.